Office-Supreme Court, U.S.
FILED
NOV 8 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 659

FRANK ROSS,

Petitioner,

vs.

F. E. STANLEY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MIDWESTERN CONSTRUCTORS, INC., WALCO ENGINEERING & CONSTRUCTION CO. AND MIDWESTERN-WALCO CONTRACTORS

DAVID W. HEDRICK
OF GILES, HEDRICK & ROBINSON
First Federal Building
109 E. Church Street (P. O. Box 2631)
Orlando, Florida 32802
Attorneys for Respondents, Midwestern Constructors, Inc., Walco Engineering & Construction Co. and Midwestern-Walco Contractors

November 6, 1965

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Opinions Below 1
Jurisdiction 2
Questions Involved 2
Statute Involved 2
Statement of the Case 2
Argument 4
1. There Is No Question of Federal Law Involved 5
2. The Decision Below Is Clearly Correct 7
3. There Was No Departure from the Accepted and Usual Course of Judicial Proceedings 8
Conclusion 10

Citations

STATUTES

Florida Statutes, 1963, Section 95.11(5) 2

CASES

Brophy v. *Cities Service Co.*, 31 Del. Ch. 241, 70 A.2d 5, 8 (1949) 6
Calhoun County, Fla. v. *Roberts*, 137 F.2d 130 (CC 5, 1943) 10
Cristiana v. *City of Sarasota*, 65 So.2d 878 (S. Ct. Fla. 1953) 7-8
Dorchy v. *Kansas*, 264 U.S. 286, 289, 68 L. ed. 686, 689 10
Gast v. *Engle*, 85 A.2d 403 8
Geddes v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 599 6
Grable v. *Nunez*, 64 So.2d 154 ..... 7, 8
Guth v. *Loft, Inc.*, 23 Del. Ch. 255, 5 A.2d 503, 510 (Del. S. Ct. 1939) 6
Hayes v. *Belleair Development Co.*, 162 So. 698 (1935) 7

Helvering v. *Lerner Stores*, 314 U.S. 463, 466, 86 L. ed. 343, 346 8
Hormel v. *Helvering*, 312 U.S. 552, 556 10
Irving Trust Co. v. *Deutsch*, 73 F.2d 121 (CCA 2) 6
Jackson v. *Smith*, 254 U.S. 586 5
Langnes v. *Green*, 282 U.S. 531, 538 ..... 8, 10
Pepper v. *Litton*, 308 U.S. 295, 306, 311 6
Stelos Co. v. *Hosiery Motor-Mend Corp.*, 295 U.S. 237, 239, 79 L. ed. 1415, 1416 8-9
Story Parchment Co. v. *Paterson P. Paper Co.*, 282 U.S. 555, 560, 75 L. ed. 544, 547 8
Tampa Electric Co. v. *Ferguson*, 118 So. 211 (S. Ct. Fla. 1928) 8
Texarkana v. *Arkansas Louisiana Gas Co.*, 306 U.S. 188, 198, 83 L. ed. 598, 605 8
United R. & Electric Co. v. *West*, (1930) 280 U.S. 234, 74 L. ed. 390, 50 S. Ct. 123 10
United States v. *American R. Express Co.*, 265 U.S. 425, 435, 68 L. ed. 1087, 1093 8
Wayne v. *New York Life Ins. Co.*, 132 F.2d 28, 36 (CC 8, 1942) 10

AUTHORITIES

3 Scott on Trusts, Section 462.4 8

COURT RULE

Rule 24(2)(c), Fifth Circuti Court of Appeals 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 659

FRANK ROSS,

Petitioner,

VS.

F. E. STANLEY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MIDWESTERN CONSTRUCTORS, INC., WALCO ENGINEERING & CONSTRUCTION CO. AND MIDWESTERN-WALCO CONTRACTORS

OPINIONS BELOW

The opinion of the District Court (R. 127) is not yet reported. The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. A) is reported at 346 F.2d 645.

JURISDICTION

The District Court's jurisdiction was invoked on the sole ground of diversity of citizenship and this court's review is sought under 28 U.S.C., Section 1254(1).

QUESTIONS INVOLVED

Petitioner's Statement of the Questions involved does not fairly state the issues. The questions can be quite simply stated as follows:

1. In a case based solely on diversity of citizenship, did the Circuit Court of Appeals err in the application of the Florida Statute of Limitations under Florida law to the case stated on the face of the Complaint?

2. Where an entire equitable case and record is before the Circuit Court of Appeals on the pleadings, did the court have the power to determine the question of law as to the nature of the case stated in the Complaint and to dispose of the case in accordance with such determination?

STATUTE INVOLVED

Section 95.11(5), Florida Statutes, 1963 (Pet. App. D, page 29a) (Florida's three year statute of limitations).

STATEMENT OF THE CASE

This is a stockholders' derivative suit filed in August of 1962 by one stockholder of Florida Gas Company, a Florida corporation, against the directors of the corporation and all those who joined with them, alleging all defendants to be "fiduciaries" owing the same duty to the stockholders. The breach of duty alleged was that in November, 1958, the

directors awarded contracts to the construction and engineering defendants, including these respondents, despite "foreseeable injury" to the corporation which would result therefrom. It asserted that all "defendants are jointly and severally liable for the profits realized by each of them and for the damages sustained and to be sustained" and demanded an equitable accounting.

These respondents (and others) filed a Motion to Dismiss on the specific ground (among others) that the Complaint showed on its face that it was barred by Florida's three year statute of limitations or laches.

The District Court granted the motions and in its Order (R. 127) recited that the Second Amended Complaint (which consisted of only one count) was based on two theories of recovery and that one, for damages, was barred by the Florida three year statute of limitations and that the other, "the claim for unjust enrichment cannot accrue, *if at all*," until the FPC rate base proceeding was concluded and that the claim was premature. The court dismissed the cause without prejudice to the right of plaintiff to bring a further action for relief for restitution and unjust enrichment at the termination of the FPC proceeding. The District Court specifically did not pass on various other grounds urged which respondents did not and have not waived.

Plaintiff in his Notice of Appeal (R. 134) appealed from the above order "and from each and every part of such order." His Statement of Points on Appeal (R. 135) and the specification of errors in his brief assigned as error:

> "1). . . holding the claim for breach of fiduciary duty barred by the statute of limitations.
>
> 2). . . holding the claim for unjust enrichment to be premature.

3)... dismissing the action on the foregoing grounds.

4)... dismissing the Second Amended Complaint on the foregoing grounds."

No cross appeal was filed by any respondent.

The Appellate Court, considering the matters thus put in issue by plaintiff, concluded that the Complaint stated only one case against the respondents and that the whole claim was barred by the statute of limitations and affirmed the judgment of the trial court "to the extent that it dismissed the claim as being barred by the statute of limitations" and remanded it to permit the remainder of the judgment to be amended "in a manner not inconsistent with this opinion."

Referring to the statute of limitations ruling, petitioner in his Petition (p. 6) asserts that respondents have conceded that uncertainty of profits and damages would have prevented the institution of suit in November, 1958. Such statement is totally untrue as to these respondents and unavailing as to the rest.

The FPC decisions have no bearing on the deciding issue of the case and are therefore not discussed under this section of the brief.

ARGUMENT

The issue in this case is extremely narrow and no amount of clever obfuscation by petitioner can convert it into one warranting review by this court. Of the numerous statutes of limitations of the fifty states, we are concerned with only one statute of one state and only in one particular set of circumstances. The petitioner does not question the fact that the state statute of limitations is controlling; he is merely seeking to avoid that statute by attempting to

inject two Federal statutes into the case. These Federal statutes were clearly collateral and were not the basis of any rights sued upon. The lower court did not interpret such statutes and they cannot possibly be a material factor in the case. Clearly there is *no* question of Federal law, much less an important question, and the Appellate Court has correctly decided the matter and rightly and properly exercised its power in arriving at its decision.

1. There Is No Question of Federal Law Involved.

No Federal question exists in this case. Federal jurisdiction exists solely because of diversity and there is no dispute but what state law is determinative of the existence and nature of a claim, if any, and the statute of limitations applicable to it. The real gravamen of the case is the alleged breach of the corporate directors' duty not to so deal with their own corporation so as to be able to make a profit for themselves. Cases cited at previous stages of this case clearly show that the alleged *wrong* is the *self-dealing* which *might* be contrary to the *cestui que* trust. The clearest exposition of the theory proceeded upon is set out in *Jackson* v. *Smith,* 254 U.S. 586, which dealt with a receiver's purchasing property over which he had authority and the court said:

> "When he agreed with Smith and Wilson to join in the purchase if Wilson should become the successful bidder, he placed himself in a position in which his personal interests *were, or might be,* antagonistic to those of his trust. *Michoud* v. *Girod,* 4 How. 503, 552, 11 L.ed. 1076, 1098. It became to his personal interest that the purchase should be made by Wilson for the lowest possible price. The course taken was one which a fiduciary could not legally pursue. *Magruder* v. *Drury,* 235 U.S. 106, 119, 120, 59 L.ed. 151, 156, 35 Sup.Ct.Rep. 77. And others who knowingly join a fiduciary in such an enterprise likewise become jointly

and severally liable with him for such profits . . ." (Emphasis supplied).

See also: *Irving Trust Co.* v. *Deutsch,* 73 F.2d 121 (CCA 2); *Guth* v. *Loft, Inc.,* 23 Del. Ch. 255, 5 A.2d 503, 510 (Del.S.Ct. 1939); *Brophy* v. *Cities Service Co.,* 31 Del. Ch. 241, 70 A.2d 5, 8 (1949); *Pepper* v. *Litton,* 308 U.S. 295, 306, 311; *Geddes* v. *Anaconda Copper Mining Co.,* 254 U.S. 590, 599.

All of these cases deal with self-dealing of one form or another. None of them dealt with or required any rights founded on an administrative ruling. If the alleged facts concerning the relationship of the parties and the contracts be true, leaving out the FPC proceeding altogether, they alone set out the real cause of action.

The allegations concerning the FPC proceeding are purely window dressing, probably designedly inserted by appellant's very able lawyers to try to avoid the statute of limitations which had already run. The cause of action, if any, was complete when the directors breached their duty by ratification of the contracts on October 23, 1958, and permitting the contracts to be signed on November 3, 1958. On the signing of the contracts, contractual rights immediately arose in the contracting firms and a constructive trust arose in favor of the corporation and its stockholders as to such rights and the benefits flowing therefrom. The potential FPC proceeding was, at most, only one of the circumstances surrounding the action of the directors. The FPC proceeding might or might not at some future time have some economic effect on the corporation, but the test as has been seen from the cited cases is whether in authorizing or ratifying the contracts in light of all existing circumstances they violated their fiduciary duty.

2. The Decision Below Is Clearly Correct.

There is no conflict between the Appellate Court's decision and applicable state law. The Florida Supreme Court has defined directors of a corporation as being trustees under a constructive trust and subject to statutes of limitations in *Hayes* v. *Belleair Development Co.*, 162 So. 698 (1935), and defined the time for the commencement of the running of the statute of limitations in *Grable* v. *Nunez*, 64 So.2d 154, as:

> "(3) Constructive Trusts are subject to statutes of limitation, and the period of limitation commences to run from the time when the trust came into being, *Hayes* v. *Belleair Development Co.*, 120 Fla. 326, 162 So. 698; *Gast* v. *Engel*, 369 Pa. 137, 85 A.2d 403."

The cases set out in the Appellate Court's decision amply show that an action for equitable accounting will lie in Florida under the alleged circumstances. This action is maintainable as soon as the wrongful act has been done. The cases set out in Section 1 of this argument show that *no loss or damages are necessary* to create the right of action.

The cases cited by petitioner are clearly distinguishable from the true rule governing this case. They all deal with the situation where the wrongful act is committed and there is a delay in the invasion of the plaintiff's rights. This delay in the accrual of the cause of action has been recognized in flooding cases, lateral support cases and delayed explosion cases where the plaintiff's legal rights *are first invaded* at the happening of the subsequent event. This situation is clearly distinguishable from the cases where the wrongful act is completed and *at the same* time the plaintiff's legal rights are immediately invaded although the plaintiff has not yet suffered any substantial loss or damage. In the latter type case the statute of limitations commences to run immediately. See *Cristiana* v. *City of*

Sarasota, 65 So.2d 878 (S.Ct. Fla. 1953). Thus the right of action accrues when the wrongful act is completed and some legal invasion of rights has taken place—however slight—regardless of the time when the consequential damages arise. See *Gast* v. *Engle,* 85 A.2d 403, relied on in *Grable* v. *Nunez, supra;* 3 Scott on Trusts, Section 462.4. Florida recognizes the principle of nominal damages. See *Tampa Electric Co.* v. *Ferguson,* 118 So. 211 (S. Ct. Fla. 1928).

Under the allegations of this case the duty of the fiduciary would be breached when the contracts were signed and created certain contractual gains or advantage in the directors and those associated with them, which, if improper under the circumstances, they should not be permitted to keep. The decision is definitely not in conflict with applicable state law.

3. There Was No Departure from the Accepted and Usual Course of Judicial Proceedings.

Petitioner's contention that the Appellate Court could not modify the lower court's decision to the detriment of the appellant is without merit. The order was one of complete dismissal of the action and the Appellate Court's action was to confirm the action of the lower court and in the process to direct the disposition of the action in accordance with its determination. That the respondent can urge additional grounds, even those overruled in the lower court, in support of the judgment is without question. See *Langnes* v. *Green,* 282 U.S. 531, 538; *Story Parchment Co.* v. *Paterson P. Paper Co.,* 282 U.S. 555, 560, 75 L.ed. 544, 547; *Helvering* v. *Lerner Stores,* 314 U.S. 463, 466, 86 L.ed. 343, 346; *United States* v. *American R. Express Co.,* 265 U.S. 425, 435, 68 L.ed. 1087, 1093; *Texarkana* v. *Arkansas Louisiana Gas Co.,* 306 U.S. 188, 198, 83 L.ed. 598, 605; *Stelos Co.* v.

Hosiery Motor-Mend Corp., 295 U.S. 237, 239, 79 L.ed. 1415, 1416.

The Order of the lower court dealt with the Complaint as being based on two theories and dismissed the entire action, without prejudice to the plaintiff bringing another action for relief on the theory of unjust enrichment after the conclusion of the pending FPC proceeding. The plaintiff appealed from the entire Order (R. 134) and specifically assigned as error in his Statement of Points on Appeal (R. 135) and the Specification of Errors in his brief that the District Court erred in holding that:

> "1. . . the claim for breach of fiduciary duty was barred by the statute of limitations."
>
> "2. . . the claim for unjust enrichment to be premature."
>
> "3. . . in dismissing the action on the foregoing grounds."
>
> "4. . . in dismissing the Second Amended Complaint on the foregoing grounds."

Rule 24(2)(c) of the Fifth Circuit Court of Appeals requires such Specification of Errors and provides:

> "Errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not specified."

The petitioner thus created the issues to be decided in the Appellate Court. To decide whether the court erred in holding that the alleged claim for unjust enrichment was premature, the court necessarily had to go into the allegations of such claim and if actually premature *when* it did accrue. The Appellate Court ruled that the claim in actuality was part and parcel of the single case stated and that the whole case had accrued at such a time that the whole case was barred by the statute of limitations. It necessarily had to dispose of the case in accordance with

its decision. The whole case and the whole record of this equitable action were before it and there could be no question that the court had full power to go into each such issue. See *Langnes* v. *Green,* 282 U.S. 531, 538; *Hormel* v. *Helvering,* 312 U.S. 552, 556; *Wayne* v. *New York Life Ins. Co.,* 132 F.2d 28, 36 (CC 8, 1942); *Calhoun County, Fla.* v. *Roberts,* 137 F.2d 130 (CC 5, 1943); *Dorchy* v. *Kansas,* 264 U.S. 286, 289, 68 L.ed 686, 689.

Even if the exact point had not been put in issue by the petitioner, the law is clear that where the matter is closely related to the subject to the appeal that it is not necessary for appellees to cross appeal in order for the Appellate Court to decide the present questions even though the determination of them would be beneficial to appellees. See *United R. & Electric Co.* v. *West* (1930), 280 U.S. 234, 74 L.ed. 390, 50 S.Ct. 123. It is therefore apparent that this decision was no departure from the accepted and usual course of judicial proceedings, but is an example of the proper exercise of appellate authority.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Writ of Certiorari should be denied.

Respectfully submitted,

DAVID W. HEDRICK
OF GILES, HEDRICK & ROBINSON
First Federal Building
109 E. Church Street (P. O. Box 2631)
Orlando, Florida 32802
Attorneys for Respondents, Midwestern Constructors, Inc., Walco Engineering & Construction Co. and Midwestern-Walco Contractors

November 6, 1965

PROOF OF SERVICE

I, David W. Hedrick, one of the attorneys for Midwestern Constructors, Inc., Walco Engineering & Construction Co. and Midwestern-Walco Contractors, some of the respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of November, 1965, I served copies of the foregoing Brief on Frank Ross, Petitioner herein by mailing a copy in a duly addressed envelope, with air mail postage prepaid to William E. Haudek, Attorney for Petitioner, 295 Madison Avenue, New York, New York, 10017.

.....

DAVID W. HEDRICK
OF GILES, HEDRICK & ROBINSON
First Federal Building
109 E. Church Street
Orlando, Florida